

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MATTHEW W. FOX)	
Claimant)	
VS.)	
)	Docket No. 173,869
PRAYTOR CONSTRUCTION CO., INC.)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	

ORDER

Both claimant and respondent appeal from a June 28, 1995, Decision entered by Administrative Law Judge Thomas F. Richardson. The Appeals Board heard oral arguments on November 2, 1995, by telephone conference call.

APPEARANCES

Claimant appeared in person and by his attorney, Kent A. Roth of Great Bend, Kansas. The respondent and its insurance carrier appeared by their attorney, Edward D. Heath, Jr., of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations listed in the Decision of the Administrative Law Judge.

ISSUES

The Administrative Law Judge found claimant to have a 55 percent permanent partial general disability. Both claimant and respondent appealed the Administrative Law Judge's finding as to the nature and extent of claimant's disability. Claimant also raised an issue as to his entitlement to vocational rehabilitation benefits including payment of temporary total disability compensation until the vocational assessment has been completed.

Claimant, in his Application for Board Review and in the Brief of Claimant, raises issues concerning certain past medical expenses, penalties for respondent's failure to pay same and future medical. However, at oral argument it was announced that these were no longer issues for Appeals Board review. Accordingly, these, as well as the other findings of the Administrative Law Judge which were not raised as issues by this appeal, are hereby approved and affirmed by the Appeals Board.

Therefore, the issues for determination before the Appeals Board are:

- (1) Nature and extent of claimant's disability.
- (2) Claimant's entitlement to vocational rehabilitation benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record and considered the arguments and briefs of the parties, the Appeals Board finds that the Decision entered by the Administrative Law Judge should be affirmed in part and remanded in part for further determinations as follows:

- (1) Claimant has a 55 percent permanent partial general disability and the finding by the Administrative Law Judge as to the nature and extent of claimant's disability should, therefore, be affirmed.

Claimant worked for respondent for approximately one and a half years prior to his May 11, 1992, accident. Claimant injured his low back when an 8-inch gas line pipe being loaded on a truck by a fork lift began to shift. Claimant attempted to stop the pipe from rolling off but, in the process, was knocked to the ground with the pipe.

Claimant was initially treated by a chiropractor but was subsequently referred to Dr. C. Reiff Brown by the respondent's insurance carrier. Dr. Brown examined claimant, consulted with a neurologist, and made a referral to orthopedic surgeon Stephen Ozanne, M.D., for possible surgery. A L5-S1 laminectomy and discectomy was performed by Dr. Ozanne on November 4, 1993. Dr. Ozanne, a board-certified orthopedic surgeon, treated claimant and performed the surgery for claimant's L5-S1 disc herniation. Claimant was also diagnosed as having a herniation at L4-5 but surgery was not performed for that condition. Dr. Ozanne rated claimant as having a 10 percent permanent functional impairment. He determined claimant to have reached maximum medical improvement on August 26, 1994. He placed permanent physical restrictions upon claimant at that time which included lifting limited to 20 pounds occasionally and 10 pounds frequently. Dr. Ozanne also adopted the July 28, 1994, functional capacities evaluation report by

Mark Schukman, physical therapist with the Central Kansas Spine Center. The restrictions contained in that report, which is deposition Exhibit 4 to the February 8, 1995, deposition of Dr. Ozanne include occasional standing, walking, climbing, kneeling, and crawling; no bending; and with the added restriction that claimant “needs to change positions frequently from sitting, standing and walking.”

Dr. Ozanne’s restrictions were taken into consideration by the two vocational experts who offered opinions on claimant’s loss of labor market access and loss of ability to earn a comparable wage. Utilizing Dr. Ozanne’s restrictions, including those contained in the functional capacity evaluation report, vocational expert James Molski testified that claimant had lost 70 to 75 percent of his ability to access the open labor market and 47 to 54 percent of his ability to earn a comparable wage. He also opined that claimant retained the ability to earn \$4.75 to \$5.50 per hour, or \$190 to \$205 per week. When compared to the stipulated average weekly wage of \$469.60, this represents a 53 to 59.5 percent reduction in claimant’s wage-earning ability.

Mr. Molski also gave opinions concerning claimant’s labor market and wage loss utilizing restrictions recommended by Dr. C. Reiff Brown and Dr. Ernest R. Schlachter. However, those opinions cannot be utilized as they were objected to and neither Dr. Brown nor Dr. Schlachter were deposed in this case.

Respondent presented the testimony of vocational expert Karen Terrill. Ms. Terrill also offered opinions concerning claimant’s loss of access to the open labor market and his loss of ability to earn a comparable wage. As did Mr. Molski, Ms. Terrill also gave opinions utilizing restrictions issued by Dr. Brown and Dr. Schlachter. Again, those opinions were objected to by claimant’s counsel. That objection is, likewise, sustained and, accordingly, those opinions cannot be considered.

Utilizing the restrictions recommended by Dr. Ozanne, Ms. Terrill opined that claimant had suffered a 57 percent loss of labor market access. In addition, Ms. Terrill opined that claimant retained the ability to earn \$6.50 per hour which, when compared to the \$7 per hour claimant was making at the time of the injury, would result in a 7 percent loss of wage-earning ability. However, when compared to the average weekly wage of \$469.60, \$6.50 per hour times 40 hours or \$260 represents a 44.6 percent wage loss. Ms. Terrill noted that claimant was not restricted from working overtime, but did not offer an opinion as to the amount of overtime nor the value of fringe benefits claimant could expect to earn in the open labor market postinjury. Furthermore, Ms. Terrill, in considering the restrictions of Dr. Ozanne, in addition to the lifting restrictions, only considered the additional restrictions against bending and kneeling. Accordingly, she did not factor into her opinions the restrictions limiting claimant to occasional standing, walking, climbing, and crawling; nor did she consider the restriction concerning claimant’s need to change positions frequently. However, Ms. Terrill testified that those restrictions contained in the functional capacity assessment report dated September 29, 1995, were essentially consistent with the restrictions Dr. Ozanne placed upon claimant which limited claimant to the light capacity of work. In addition, she did not consider the positional changes to be any more restrictive than what would otherwise fall within the light capacity of work.

Therefore, considering the need to frequently change positions and only occasionally stand, walk, and climb would not change Ms. Terrill's opinions.

Claimant testified at regular hearing that he had been working part time as a bartender earning \$4.50 an hour. On cross-examination, Ms. Terrill acknowledged that if claimant's preinjury average weekly wage was compared to the \$95 per week claimant was earning at his part-time bartending job, he would have approximately an 80 percent reduction in wage. However, in her opinion, this would not represent claimant's postaccident wage earning ability.

Respondent did not prepare a submission letter to the Administrative Law Judge nor did respondent submit a brief to the Appeals Board. It is difficult, therefore, to ascertain precisely what the respondent's positions are on the issues. During oral argument, respondent argued that the award by the Administrative Law Judge of a 55 percent work disability should be reduced to 35 percent. Respondent argues the Administrative Law Judge erred when he rejected the opinion testimony of Ms. Terrill as to claimant's wage-earning ability because Ms. Terrill compared the claimant's postinjury wage-earning ability to his preinjury hourly wage instead of to his average weekly wage. The Appeals Board agrees that Ms. Terrill's testimony can be utilized to the extent that she was saying claimant retained the ability to earn \$6.50 per hour as compared to the \$7 per hour claimant was earning as his base rate with respondent. Also, as there are no restrictions on claimant's ability to work overtime, he has the capability of earning the same amount of overtime postinjury which he worked for respondent. Furthermore, claimant testified that he applied for a job which would pay him \$6.35 per hour which, although he did not obtain that job, is nevertheless indicative of the local labor market and of his wage-earning ability.

Accordingly, claimant has a loss of ability to access the open labor market of between 57 percent and 75 percent. His loss of ability to earn a comparable wage is within a range of 44.6 to 59.5 percent. The Administrative Law Judge found claimant's work disability to be 55 percent and awarded permanent partial disability benefits based upon that percentage. The Appeals Board agrees with that finding. Although it is not a strict average of the various opinions expressed by the two vocational experts, it is within the range of those opinions. It is reasonable and appropriate and should be affirmed.

(2) Claimant seeks payment of temporary total disability compensation during the period of vocational rehabilitation assessment. In addition, claimant seeks a referral for another vocational rehabilitation assessment for development of a plan which would enable claimant to receive the training necessary to return him to a comparable wage. In this case, claimant initially refused vocational rehabilitation services but subsequently changed his mind and requested same. Temporary total disability benefits were terminated at the same time that vocational rehabilitation services were discontinued. Claimant argues he is entitled to a resumption of temporary total disability benefits from the date they were discontinued up to the present and that such benefits should continue until a vocational rehabilitation assessment has been completed.

The Administrative Law Judge's Decision only states "claimant is entitled to vocational rehabilitation benefits only upon proper application to and approval by the Director of Workers Compensation." This is not a decision on claimant's request. Claimant is entitled to a decision on his claim for vocation rehabilitation benefits. It was expressly made an issue in the case and is so noted under the issues paragraph of the Administrative Law Judge's Decision. The Appeals Board disagrees with claimant that he is entitled to additional, past, and ongoing vocational temporary total disability benefits. However, as to the limited issue of vocational rehabilitation benefits, this case should be remanded to the Administrative Law Judge for a determination as to claimant's request for a vocational assessment and, if recommended, then also a subsequent determination as to an appropriate vocational plan. Temporary total or temporary partial disability benefits could also be awarded in connection with such assessment and/or plan.

The Administrative Law Judge ordered respondent to pay a medical bill to Dr. Ozanne in the amount of \$198. In addition, the Administrative Law Judge found claimant to be entitled to future medical treatment upon application to and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Decision entered by Administrative Law Judge dated should be, and hereby is, affirmed as to the nature and extent of claimant's disability and remanded for a determination of claimant's need for vocational rehabilitation.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Matthew W. Fox, and against the respondent, Praytor Construction Co., Inc., and its insurance carrier, Aetna Casualty & Surety Co., for an accidental injury which occurred May 11, 1992, and based upon an average weekly wage of \$469.60 for 98 weeks of temporary total disability compensation at the rate of \$289 per week or \$28,322, followed by 317 weeks of permanent partial compensation at the rate of \$172.19, per week for a 55% permanent partial general disability, making a total award of \$82,906.23.

As of October 7, 1996, there is due and owing claimant 98 weeks of temporary total disability compensation at the rate of \$289 per week or \$28,322, followed by 230 weeks of permanent partial compensation at the rate of \$172.19 per week in the sum of \$39,630.70 for a total of \$67,925.70, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$14,980.53 is to be paid for 87 weeks at the rate of \$172.19 per week, until fully paid or further order of the Director.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

Claimant is entitled to future medical treatment only upon proper application to and approval by the Director of Workers Compensation.

Claimant is entitled to payment of a medical bill to Dr. Ozanne in the amount of \$198.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid directly as follows:

Tri State Reporting Services	
Preliminary Hearing	\$149.15
Susan Maier	
Regular Hearing	\$158.82
Don K. Smith & Associates	
Deposition of Jim Molski	\$169.50
Deposition of Dr. Ozanne	\$174.00
Deposition of Karen Terrill	\$174.50

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kent A. Roth, Great Bend, KS
Edward D. Heath, Jr., Wichita, KS
Kenneth Johnson, Administrative Law Judge
Philip S. Harness, Director